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Ex Parte

September 15, 2003

Ms. Marlene Dortch
Secretary, Federal Communications Commission
445 12th Street, S.W.
Washington, DC 20554

Re: CC Dockets Nos. 01-338, 96-98, and 98-147

Dear Ms. Dortch,

On September 15, 2003, Tom Koutsky, Vice President, Law and Public Policy for Z-Tel Communications, had a telephone conference with Michelle Carey of the Wireline Competition Bureau, about inconsistencies between footnote 1990 of the *Triennial Review Order*, on the one hand, and paragraph 584 and footnote 1977 of the *Order*. Z-Tel understands that the Commission is considering correcting these inconsistencies, perhaps through an erratum.[1] Z-Tel would like to make clear that it does not seek reconsideration – Z-Tel plans to challenge the order immediately in court – but offers these comments in the event the Commission takes unilateral action.

There is no question that footnote 1990 contradicts both paragraph 584 and footnote 1977. First, paragraph 584 states: "[W]e require that incumbent LECs permit commingling of UNEs and UNE combinations with other wholesale facilities and services, including any network elements unbundled pursuant to section 271." Yet footnote 1990 states: "We also decline to apply our commingling rule, set forth in Part VII.A above [which includes paragraph 584], to services that must be offered pursuant to these checklist items." Second, footnote 1977 states that, when the Commission addresses Verizon's petition asking the Commission to forbear from enforcement of the requirements in the section 271 checklist requiring BOCs to provide unbundled access to loops, transport, switching, and signaling, "we will also address Verizon's related

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[1] *See* Letter from Ann D. Berkowitz, Verizon, to Marlene Dortch, Secretary, FCC, in CC Docket Nos. 01-338, 96-98 and 98-147 (Sept. 10, 2003) (referencing Verizon discussion on unspecified clarification of language in the Order).

argument that BOCs that offer access to delisted checklist items pursuant to section 271 alone are under no obligation to combine the elements for requesting carriers." Yet footnote 1990 states: "We decline to require BOCs, pursuant to section 271, to combine network elements that are no longer required to be unbundled under section 251."

With respect to the commingling inconsistency, the logic of paragraph 584 is plainly superior to the unexplained conclusion announced in footnote 1990. In paragraph 584, the Commission explained that commingling restrictions would "impose additional costs on competitive LECs choosing to compete through multiple entry strategies," and "could even require a competitive LEC to forego using efficient strategies for serving different customers and markets." In addition, paragraph 584 adds, not permitting commingling "would constitute a discriminatory condition . . . because incumbent LECs impose no such limitations" on themselves. Footnote 1990 fails to acknowledge, much less respond to, the conclusions reached in paragraph 584.

It bears emphasis that the discriminatory nature of the commingling restriction announced in footnote 1990, but repudiated in paragraph 584, renders that restriction inconsistent with the Act under any circumstances. In our view, item two on the section 271 checklist, which requires "[n]ondiscriminatory access to network elements," means what it says. We recognize that the Commission believes that checklist item two applies only to network elements that are required to be unbundled pursuant to section 251(c)(3) and in paragraph 662 stated that the standards of sections 201 and 202 apply to network elements that are required to be provided on an unbundled basis only by BOCs with authorization to provide long-distance service. But sections 201(b) and 202(a), of course, apply to terms and conditions as well as to rates, and section 202(a) specifically prohibits "unreasonable discrimination." For the reasons explained in paragraph 584, a commingling restriction would be unreasonably discriminatory: it would plainly be discriminatory, because the BOCs impose no such restrictions on themselves, and it would be unreasonable because it would "impose additional costs" on competitors for no good reason and might require them "to forego using efficient strategies."

For the same reasons, BOCs may not, consistent with the statute, decline to combine network elements at the request of competitors.[2] Once again, in our view checklist item two plainly requires BOCs to provide nondiscriminatory access to network elements. But even under the Commission's view, unreasonable discrimination is prohibited under section 202(a), and any rule that permitted BOCs to sabotage network elements or to decline to combine network elements would be unreasonably discriminatory.

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[2] Commingling rules would apply in the event a CLEC requested a combination of a specifically-enumerated section 271 element not required to be unbundled under section 251(d) and a network element ordered to be unbundled pursuant to section 251(d). Combination rules would be needed in the event a CLEC requested a combination that consisted only of section 271 elements, none of which are required to be unbundled under section 251(d). Both of these rules are necessary for competitors to compete, and there is no evidence that Congress, when it specifically-enumerated network elements in the checklist, intended to make a distinction between a 271 element ordered in combination with a UNE and a 271 element not so ordered.

The Supreme Court's decisions in *AT&T Corporation v. Iowa Utility Board*, 525 U.S. 366 (1999), and *Verizon Communications, Inc. v. FCC*, 535 U.S. 467 (2002), practically compel that conclusion. In *Iowa Utilities Board*, of course, the Court upheld part of the Commission's "combinations" rule, 47 C.F.R. 51.315(b), and rejected the BOCs' arguments that they had the right to "dismantl[e] existing combinations to sabotage competitors." *Verizon*, 535 U.S. at 534-35. The Court explained that "§ 251(c)'s nondiscrimination requirement" supported a rule prohibiting the BOCs from engaging in the "anticompetitive practice" of "impos[ing] wasteful costs" on other carriers. *Iowa Utilities Board*, 525 U.S. at 395. Similarly, in *Verizon* the Court upheld the portions of the Commission's combinations rule – section 51.315(c) – requiring BOCs to combine network elements (in return for a reasonable cost-based fee that includes a profit) even when they are not ordinarily combined. The Court explained that the rule "is justified by the statutory requirement of 'nondiscriminatory access.' §251(c)(3)." *Verizon*, 535 U.S. at 537.

While Z-Tel disagrees strongly with the Commission's conclusion that specifically-enumerated checklist items need only be made available pursuant to the just and reasonable standards of sections 201(b) and 202(a), it is important to note that those provisions extend not only to rates but also to terms and conditions of availability. Paragraph 662 clearly states that terms and conditions of access to section 271 checklist items would be subject to section 201(b) and 202(a) just and reasonable standards.[3] The just and reasonable standard of sections 201(b) and 202(a) involve more than pricing – section 201(b) states that "all charges, practices, classifications and regulations for an in connection with such communication service, shall be just and reasonable," and section 202(a) likewise prohibits "unjust or unreasonable discrimination in charges, practices, classifications, regulations, facilities, or services for or in connection with like communication service." Such just and reasonable standards therefore clearly extend beyond price and encompass terms and conditions of competitive access to section 271 elements, which would include restrictions on combinations or commingling of section 271 services with UNEs.

Z-Tel has long maintained that the section 271 checklist means what it says and says what it means. Congress clearly intended that BOCs seeking to sell interLATA services must provide all specifically-enumerated checklist items (which include loop transmission, transport, switching and signaling), and Commission section 271 precedent maintains that such provision must be in a commercially-meaningful manner. If the Commission is correct and sections 201(b) and 202(a) govern the provision of section 271 elements, BOC restrictions on combinations and commingling of section 271

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[3] In para. 662, the Commission stated: "in the *UNE Remand Order*, the Commission stated that . . . [i]f a checklist network element does not satisfy the unbundling standards in section 251(d)(2), the applicable prices, terms and conditions for that element are determined in accordance wit sections 201(b) and 202(a). We reach essentially the same result here." While Z-Tel strongly disagrees with the Commissions application of sections 201(b) and 202(a), application of those sections must apply *in their entirety* and include terms and conditions, not simply price. Otherwise, a BOC could propose an ostensibly reasonable price but unreasonably limit the terms and conditions of access.

elements should be decided in accord with those provisions. In such event, the language in footnote 1990, which portends to decide this issue without any discussion and indicates that all BOC restrictions on any combination or commingling involving a section 271 element are *per se* permissible is inconsistent with the text of the Order.

This letter is being filed electronically in CC Dockets Nos. 01-338, 96-98, and 98-147.

Sincerely,

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